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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 500

GUY S. MARTIN,
Petitioner,

v.

NATIONAL SURETY COMPANY, a Corporation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Guy S. Martin, respectfully presents this, his petition for a writ of certiorari, addressed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding it and the clerk thereof to certify to this Court the record and proceedings of the case in that court, numbered 10,536 therein, wherein your petitioner was appellant and National Surety Company, a corporation, and other corporations and individuals were appellees, together with its opinion therein, for review and determination of said cause by this Court.

(Note: Record references throughout are to pages in printed copies, not to original record.)

A.

STATEMENT OF THE MATTER INVOLVED.

I. The Issue Presented.

On the merits of this case the Court of Appeals passed upon but one question, and the decision announced its conflict with other Circuit Courts of Appeals and its view that the Supreme Court should settle that question to avoid the confusion which now exists. The question was:

Is money caused to be repaid to the lender by a contractor on a United States Government contract out of progress payments subject, in the hands of the lender, to an equitable lien in favor of materialmen and laborers, requiring the lender to turn over the money to materialmen and laborers as the creditors entitled thereto?

The rule favored by the federal courts has been that the money reserved under the terms of construction contracts for public works is subject to a prior lien in favor of unpaid materialmen and laborers, but that such lien or right does not extend to payments made as the work progresses. The Court of Appeals in this case held that the lien extended to progress payments collected by a lender of money at the instance of the contractor, and its decision in that respect presents a clear conflict.

II. Statement of Facts and Proceedings.

Respondent, National Surety Company, a corporation organized under the laws of New York, filed its bill in equity in the District Court at St. Louis, Missouri, on February 9, 1933, naming as defendants Guy S. Martin (the petitioner) and Albert Clement Tobin, citizens of Missouri, and certain officials of the United States Government as to

whom the cause was subsequently dismissed by the District Court. The respondent sued as surety on a bond furnished by Tobin in connection with a contract which he had been awarded for the construction of the United States post office building at Carlinville, Illinois. In its amended bill of complaint (R. 6), the surety alleged that there were unpaid claims outstanding for labor and material furnished the contractor, and asked an injunction against the collection by the contractor, or by Martin as his attorney-in-fact, of the unpaid balance due under the contract (consisting of the retained percentage and a small sum withheld by the Government to cover unfinished work), and against the disposition by either of them of money theretofore received thereunder, particularly the sum of $10,448.10, which represented the proceeds of estimates for work during the months of December, 1932, and January, 1933. Such sum had been collected by Martin (petitioner here) under a power of attorney executed to him by the contractor. Also sought by the surety was an order directing Martin to deliver said sum of $10,448.10 to the clerk of the court, or to a receiver, if one should be appointed.

Martin and Tobin, in answering, pleaded their willingness to have the sum still due and unpaid under the contract used for the payment of claims for material and labor furnished in the construction of the building (R. 23), but asserted as to the $10,448.10 collected by Martin that this had been applied with authority from Tobin to the repayment of an indebtedness owing from the latter to the former and arising from the advancement of various sums of money for use in and expenses of the building construction (R. 24). It was further asserted that Martin was entitled to retain the sum collected (excepting for a small balance over the indebtedness), and that his right thereto

was superior or at least equal to that, if any, the surety may have had before delivery of the check by the United States Government (R. 25).

Following a hearing on an order to show cause, the District Court issued a restraining order enjoining defendants Tobin and Martin from collecting further payments under the contract, and directed Martin to deposit in court the sum of $9,000.00 (R. 17). Subsequently, after a hearing on the merits, the temporary injunction was made permanent and the balance of $1,448.10, which had been collected by Martin, was ordered paid into court and deposited with the $9,000.00 theretofore paid in, such deposit to abide further orders as to the disposition of the fund (R. 30-31). This decree was based on findings by the Court, among others, of certain facts which, as they were undisputed, may be summarized from such findings as follows: That one of the conditions of the bond given by the contractor and required by statute (40 U. S. C., Sec. 270), was that the contractor "shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract" (R. 26, par. 2); that the contractor, in his application for bond, had agreed to a provision assigning to the surety "all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable" to the contractor "at the time of any breach or default" in the construction contract (R. 27, par. 4, "6th"); that Martin had executed the performance bond as agent of the surety contrary to the instructions of his superiors (R. 27, par. 5); that Martin had advanced Tobin funds from time to time to enable him to carry on the work of constructing both the Carlinville post office and one, previously constructed, at Havana, Illinois (R. 27, par. 6); that in December, 1932, when

the Carlinville building was nearing completion the contractor was indebted to Martin in a sum in excess of $10,000 for money loaned (R. 27, par. 7); that at that time the contractor gave Martin a power of attorney authorizing collection of the balance due on the contract, and that the final estimate of $10,448.10 was collected on February 6, 1933, by Martin, who sought to apply the same to the indebtedness of Tobin (R. 28, pars. 8 and 9); that Martin was fully advised as to the terms of the contract, the bond and the application for bond, and that the building had been substantially, but not entirely, completed, and had been occupied but not formally accepted by the Government (R. 28, par. 10); that the amount still due from the Government on the contract was approximately $5,700 and that the amount of outstanding bills for labor and materials was in excess of $15,000 (R. 28, par. 11).

On its findings the District Court concluded, among other things, that the contractor's failure promptly to pay all persons who supplied labor and materials, as required by the *bond*, constituted a breach and default in the performance of the *contract* (R. 29, par. 4); that the contractor was in default and had breached the contract at the time the power of attorney was given, and at the time the money was collected (R. 29, par. 5); that by the application for bond the contractor had assigned to the surety all deferred payments, retained percentages and all money that might be or become payable at the time of any breach or default in the performance of the contract, and that by virtue of this agreement the surety was entitled to have available all sums due from the Government in December, 1932, and subsequent thereto, including the sum of $10,448.10 collected by Martin (R. 29, par. 7).

Martin, the petitioner here, complied with the orders requiring payment of the $10,448.10 into court, and there-

after, on January 24, 1934, an order was entered at the instance of the surety requiring all parties claiming any interest in the funds on deposit to file claims within a prescribed period, and requiring the filing of any objections to any claims so filed within an additional period prescribed (R. 33-34).

Martin thereupon filed his objections and exceptions to such order, and, coupled therewith in the event of their being overruled, his claim in the amount of $10,405.65. This was itemized and verified in the form required by the order, and recited that it represented payments for labor and material bills advanced on behalf of the contractor by the claimant, together with other charges and expenses incurred for the performance of the Carlinville contract; and interest thereon (R. 34-38).

Numerous other claims were filed, and Martin objected and excepted to their filing and allowance (R. 40-42). Exceptions were also filed by several claimants to the claim of Martin (R. 39-40).

As summarized in the opinion of the Court of Appeals (R. 157-158), the action then taken, after a hearing, was as follows:

> "The court duly considered Martin's claim, and found that he was entitled to nothing, because: (1) he was a partner of the contractor and his (Martin's) claim was inferior to those of the laborers and materialmen; (2) his collection of the estimates was a fraud upon the rights of creditors of the contractor, and the contractor's execution to Martin of the power of attorney was a fraud upon the surety and upon those who had furnished labor and material; (3) the claims for labor and material were superior to the claim of Martin and exceeded the fund deposited, and the surety company was insolvent; (4) Martin's hands were not clean because in a suit by the Maryland

Casualty Company against Martin and Tobin, Martin had testified that of the advances which he claimed to have made to Tobin in connection with the performance of the work here involved, the sum of $5,672 covered amounts expended in connection with other work done by the contractor at Havana, Illinois; (5) Martin did not furnish labor or material, but merely loaned money to the partnership enterprise.

"Thereupon the trial court entered a decree rejecting Martin's claim and directing the disbursement of the fund in court to claimants whose claims had been allowed. These claims were those of laborers and materialmen."

From this decree Martin appealed to the Circuit Court of Appeals for the Eighth Circuit, which, on August 12, 1936, handed down its opinion affirming the decree below (R. 154), and on August 17, 1936, a decree was entered thereon (R. 162).

In such opinion the Eighth Circuit Court ruled that the surety "had no valid assignment of the progress payments collected by Martin because of the provisions of 31 U. S. C., Sec. 203, making such an assignment void" (R. 159), but that those who had furnished labor and material for the construction of the building had rights in funds remaining due the contractor upon completion of the contract superior to those of Martin, and that such rights extended beyond the retained percentages and to the progress payments which could be identified and followed, even after their collection (R. 161).

Though reaching such decision, the Court recited:

"There is unquestionably authority for the proposition that laborers and materialmen have no rights superior to those of general creditors of a contractor

> in anything due the contractor except perhaps retained percentages,"

listing the opinions, including those from other Circuit Courts of Appeal, taking that position. In adopting the contrary view the Court expressed the hope that in a proper case the Supreme Court will take occasion to clarify the situation, in view of the importance of the question (R. 161-162).

In so holding, the Court declined to consider other questions than the one decided (R. 162).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

In asking a review of this case the petitioner respectfully shows that the decision of the Circuit Court of Appeals presents a threefold reason therefor. By its ruling that progress payments made under a Government contract are subject to an equitable lien in favor of unpaid laborers and materialmen, which is superior to the rights of either the contractor or a general creditor, even after collection of such payments, that Court (1) has run into conflict with decisions of other Circuit Courts of Appeal on the same matter; (2) has decided an important question relating to public works contracts and arising under federal law which has not been, but according to that Court itself, should be, settled by this Court; and (3) has decided such question in a way probably in conflict with applicable, though not specifically controlling, decisions of this Court.

The cases believed to conflict squarely with the decision

here, including those mentioned in the opinion as doing so (R. 161), are the following:

Third Nat. Bank v. Detroit Fidelity & Surety Co. (C. C. A. 5), 65 F. (2d) 548, cert. denied 290 U. S. 667;

Kane et al. v. First Nat. Bank of El Paso, Tex. (C. C. A. 5), 56 F. (2d) 534, cert. denied 287 U. S. 603;

Maryland Casualty Co. v. Board of Water Commissioners (C. C. A. 2), 66 F. (2d) 730, cert. denied 290 U. S. 702;

Fidelity & Deposit Co. v. Union State Bank (D. C. Minn.), 21 F. (2d) 102.

II.

In addition, and so that the points may be considered should the writ be issued for all or either of the foregoing reasons, the petitioner represents that other questions were involved below which remained undecided by the Circuit Court of Appeals, and which afford no basis either for an affirmance of the judgment and decree of the District Court nor, of themselves, for a denial of the writ. The nature of such other questions is indicated by the District Court's findings as summarized in the portion of the opinion on appeal (R. 157) heretofore quoted, but they were not in any way mentioned as controlling or influencing the opinion. In the belief that this Court may desire all issues to be more fully developed than if the single point decided by the Circuit Court of Appeals should alone be discussed, these questions are touched upon in the accompanying brief and may be grouped and outlined here as follows:

a. The finding by the District Court that Martin was a partner of Tobin on the Carlinville contract and therefore that he was liable for labor and material claims and that his claim was inferior to the others (R. 47) was not sup-

ported by the evidence and was erroneous. This finding was based solely on Tobin's testimony that he had arranged to borrow money from Martin and to divide profits with him, but this arrangement, if it existed, was made in connection with an earlier contract and it was not understood to apply to the Carlinville contract because it had not then been obtained (R. 139). Moreover, a lender of money is not made a partner in any sense merely because he is to receive a part of the profits in addition to or in lieu of interest.

b. There was no basis for the findings by the District Court that the execution of the power of attorney to Martin and his collection of the funds due for completed work constituted a fraud upon the surety and the materialmen and laborers (R. 47-48), as these actions took place subsequent to the termination of Martin's agency with the surety and were wholly independent of and unrelated to such agency.

c. The District Court erred in finding that the claim of $10,405.65 filed by Martin as representing his account on the Carlinville contract, included items of $5,672.00 advanced on the Havana contract, and in concluding therefrom that Martin did not come into equity "with clean hands" (R. 48). Such items were *not* in the claim filed (R. 34-38) nor in the audited record of Martin's account covering the Carlinville contract (Martin's Exhibit O, R. 125-127), but were in the account covering *both* contracts (Martin's Exhibit N, R. 125) and were fully explained as representing bills assumed and guaranteed by Martin on the Havana contract (R. 120, 121, 129, 130). The deposition proof referred to in the finding could of necessity relate only to the account covering both contracts, and there was no misrepresentation therein nor in the claim filed by Martin.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10,536, Guy S. Martin, Appellant, v. National Surety Company, a corporation, et al., Appellees, and that the said decree of the Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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